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12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION

15 **IVAN VERNARD CLEVELAND,**

16 Plaintiff,

17 v.

18 **BEN CURRY, Warden, et al.,**

19 Defendants.  
20

C 07-2809 JF (PR)

**DEFENDANTS' OPPOSITION  
TO PLAINTIFF'S  
ADMINISTRATIVE MOTION  
FOR AN ORDER TO SHOW  
CAUSE**

21 **Introduction**

22 Defendants oppose Plaintiff Cleveland's "administrative" motion for an order to show  
23 cause, which he filed on July 15, 2008, following the Court's order scheduling the parties'  
24 opportunity to supplement opposing and reply briefs concerning Defendants' motions to dismiss  
25 and for summary judgment.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **Statement of Issues**

28 Cleveland's counsel moved the Court for an order to show cause concerning an alleged

1 search of Cleveland's prison cell, relying entirely on Cleveland's unsworn assertions that the  
2 search upset his cell and was in retaliation for Cleveland's present litigation. Cleveland also  
3 concurrently filed an amended complaint, which added a claim based on retaliation.

4 1. Should the cell search should be addressed, where Cleveland's amended complaint  
5 raises the issue as a new cause of action, but has yet to be screened and the claim inevitably faces  
6 dismissal for Plaintiff's failure to exhaust administrative remedies before filing suit on it.

7 2. Can an unnoticed "administrative" motion properly serve to request the Court for an  
8 order to show cause why Defendants should not be sanctioned.

9  
10 **Statement of the Case**

11 Inmate Cleveland filed a complaint on May 30, 2007, seeking money damages (Compl.),  
12 from which this Court found three cognizable claims: (1) an Eighth Amendment claim for  
13 deliberate indifference to his dental care against Defendant Sather; (2) a First Amendment claim  
14 for denial of access to the courts against Defendant Crawford; and (3) an Eighth Amendment  
15 claim for sexual harassment and misconduct by Defendant Abanico stemming from a clothed-  
16 body search in October 2006 (Order of Service 2).

17 Defendants filed motions to dismiss and for summary judgment on April 1, 2008. (Docket  
18 No. 26.) On April 28, 2008, counsel for Plaintiff appeared and moved to stay this case, and to  
19 have a case-management conference to discuss adding plaintiffs to the claim against Abanico,  
20 while severing the remaining two claims into a different suit. Since then, Cleveland (*see* Docket  
21 Nos. 34, 35, 42, 44, 45, 48) and his counsel (*see* Docket Nos. 38, 50, 51, 52, 54) have alternately  
22 filed various motions, letters, and notices with the Court—with coherence between counsel and  
23 Plaintiff so lacking that Cleveland independently and mistakenly moved for sanctions against  
24 Defendants on June 10, 2008, because of their alleged failure to file a reply regarding their  
25 motions to dismiss and for summary judgment (Docket No. 42), when this reply was  
26 electronically filed and served on Cleveland's counsel on May 15, 2008 (Docket No. 41).

27 On July 15, 2008, Cleveland's counsel filed an amended complaint (Docket No. 51) and a  
28 response to the Court's scheduling order concerning briefing, which also included administrative

1 motions for leave to intervene, amend, stay dispositive briefing, and for an order to show cause  
2 regarding a search of Cleveland's cell (Docket No. 50).

3 Defendants requested a screening order of the amended complaint. (Docket No. 53.) They  
4 now briefly respond to any outstanding issue concerning Cleveland's administrative motion for  
5 an order to show cause.

### 6 7 Argument

#### 8 **I.** 9 **CLEVELAND'S NEW CLAIM CONCERNING A CELL SEARCH** 10 **SHOULD BE ADDRESSED BY COURT SCREENING RATHER** 11 **THAN ANY MOTION FOR SANCTIONS.**

##### 12 **A. Cleveland's Concerns Will be Addressed by the Court's Screening of his Amended** 13 **Complaint.**

14 Cleveland has filed an amended complaint, which supersedes the original and is now  
15 controlling in this matter. *See London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981)  
16 ("[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged  
17 in the amended complaint"). Cleveland has put retaliation at issue in his amended complaint.  
18 (Am. Compl. 2 ¶ 3.) The Court must screen inmate Cleveland's amended complaint to identify  
19 any cognizable claims and defendants. 28 U.S.C. § 1915A. Addressing these issues in advance  
20 is a premature and unnecessary burden on both the Court and Defendants because no defendants  
21 or claims may survive the screening. Indeed, the retaliation claim is sure to be dismissed because  
22 it arose after suit was filed, and thus could not have been exhausted before filing suit. *See* 42  
23 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

24 Further, to the extent that the retaliation issue stems from the original complaint, Defendants  
25 have already asserted qualified immunity as a defense in their fully briefed summary-judgment  
26 motion. (Defs.' Mot. Summ. J. 12.) Until the issue is resolved, qualified immunity should shield  
27 Defendants from the litigation burdens brought on by the initial complaint. *See Crawford-El v.*  
28 *Britton*, 523 U.S. 574, 590, 598 (1998).

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**B. Cleveland's Administrative Motion for an Order to Show Cause Is Improper and Should Not Be Addressed.**

Cleveland's unnoticed "administrative" motion for an order to show cause (Pl.'s Admin. Mot. OSC 5) is improper (*see* L.R. 7-8 and 7-11). If Cleveland truly seek sanctions, he should do so by motion under Federal Rule of Civil Procedure 11. But his counsel should move carefully after repeatedly diminishing California's Attorney General (Pl.'s Admin. Mot. OSC 4 ¶¶ d & e) and seeking sanctions based only on the unsworn allegations of his client, a convicted criminal and state inmate (*see id.* 2), as he could of course in turn be sanctioned for frivolous and unfounded allegations. *See* Fed R. Civ. P. 11(b)(3); *Gaiardo v. Ethyl Corp.* (3rd Cir. 1987) 835 F.2d 479, 485; *Hendrix v. Naphtal* (9th Cir. 1992), 971 F.2d 398, 400 ("blind reliance" on client's claims does not constitute reasonable inquiry).

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Respectfully submitted,

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